IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.400 OF 2006

Laxman Chandranbhan Khandbahale
(since deceased through L.R.) & Ors. ...Appellants

Vs.

Ghamaji Sawaliram Khandbahle
(since deceased through L.R.) & Ors. ...Respondents

WITH
SECOND APPEAL STAMP NO.9404 OF 2005

Sudam Tatya Khandbahale & anr. ...Appellants
vs.
Ghamaji Sawaliram Khandbahale
(sine deceased through L.R.) & Ors. ...Respondents

Mr. J.N.Pawar for the Appellants
Mr. R.V.More for the Respondent Nos.1a, 1b,2a,2b
Mr.S.D.Patil for Respondent Nos.3 and 4.

CORAM: A.S.OKA, J.
DATED: APRIL 13,2006.

P.C.:

1. The Second Appeal No.400 of 2006 is by the legal representatives of the original Defendant No.1. Second Appeal Stamp No.9404 of 2005 is by the original Defendant Nos.2 and 3. Since both these Appeals arise out the common Judgment and Order, the same are conveniently disposed of by a common Judgment.

2. The agreement for sale was executed by the original Defendant No.1 on 8th July 1978 in respect of his one half

undivided share in the suit land in favour of the Respondents-original Plaintiffs. The Defendant Nos.2 and 3 are the persons who are having undivided share in the suit property.

3. The Respondents-original Plaintiffs filed a suit for specific performance which was dismissed by the Trial Court holding that the Respondents have failed to prove their readiness and willingness. The Trial Court, however, recorded a categorical finding that the original Defendant No.1 is having one half undivided share in the suit land. The Trial Court also recorded a finding that the original Defendant Nos.2 and 3 have failed to prove that the Defendant No.1 had lost his right of share in the suit land according to the agreement dated 27th October 1960. An Appeal was preferred in the District Court by the original Plaintiffs. The Appellate Court passed a decree for specific performance as well as for partition and separate possession of one half share of the Defendant No.1.

4. Shri Pawar appearing for the Appellants in the Second Appeals submitted that the Appellate Court could not have passed a decree for partition in absence of the original Defendant Nos.2 and 3 who were not impleaded as parties to the Appeal. He submitted that the payment of a sum of Rs.1000/- on or before 30th April 1979 was the essence of

the
contract between the Defendant No.1 and the original Plaintiffs and as there was no readiness and willingness shown by the original Plaintiffs, the Appellate Court has committed an error in passing the decree for specific performance.

5. In Second Appeal Stamp No.9404 of 2005, the learned Advocate for the Appellants submitted that the decree passed by the Appellate Court is not binding on the Appellants (Defendant Nos.2 and 3) as they were not impleaded as party respondents to the Appeal in the District Court. He submitted that the legal necessity on the part of the Defendant No.1 is not proved.

6. I have considered the submissions. The Trial Court has recorded a categorical finding that the original Defendant No.1 has one half undivided share in the suit property. Perusal of the Judgment of the Appellate Court shows that the Defendant No.1 has not made any attempt to challenge the said finding. The Trial Court also negatived the case made out by the original Defendant Nos.2 and 3 that the Defendant No.1 had lost his share.

7. In case of agreement for sale of immoveable property, the law is very well settled that the time cannot be essence of

the contract unless it is shown that the parties have expressly made the time as the essence of contract. There is nothing in the agreement to show that the time was made essence of the contract. That is the reason why the Appellate Court recorded a finding of fact that the original Plaintiffs have shown readiness and willingness. Shri Pawar made a grievance that the sale permission was required to be obtained by both the parties and readiness and willingness is not shown by the original Plaintiffs to obtain sale permission. There is no merit in the submission. As the Defendant No.1 was the owner, it was for him to apply for sale permission if the same was required for effecting the sale. It is not the case of the Defendant No.1 that he was desirous of applying for permission but the original Plaintiffs did not cooperate or did not offer to contribute to the expenditure for obtaining permission.

8. Under Section 22 of the Specific Relief Act, 1963 the Court has power to pass a decree for possession or partition in a suit for specific performance. It is not in dispute that the said prayer was made by the original Plaintiffs in the plaint. While passing the decree for partition, the Appellate Court has directed that the decree should be sent to the Collector for effecting partition. The Collector is bound to issue notice to those who are entitled to a share in the partition. In my view, the Appellate Court had

jurisdiction to pass a decree for partition.

9. So far as the Appeal preferred by the Defendant Nos.2 and 3 is concerned, as they are not parties to the Appeal before the first Appellate Court, obviously, the decree passed by the first Appellate Court is not binding on them. In fact, there is no effective decree passed against the Defendant Nos.2 and 3. As the decree passed by the Appellate Court is not binding on the Defendant Nos.2 and 3, it is not necessary to entertain the Appeal preferred by the Defendant Nos.2 and 3.

10. There is no merit in the Appeals and the same are dismissed with no order as to costs.

Judge.